No. 77-795

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN C. WEGNER and CHARLES WEGNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JOHN C. WEGNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, John C. Wegner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The unpublished opinion of the Court of Appeals is appended to this Petition as Appendix A.

JURISDICTION

The opinion of the Court of Appeals was entered on August 8, 1977. Petitioner's Petition for Rehearing, timely filed, was denied on November 3, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals holding that the trial Court properly sustained a crucial witness' assertion of his Fifth Amendment privilege against self-incrimination, substantially conflicted not only with Petitioner's Fifth Amendment due process rights, but moreover, conflicted with Petitioner's Sixth Amendment right permitting compulsory process for obtaining witnesses in his favor.

2. Whether Petitioner was deprived a fair trial due to the conduct of the Government during its closing argument, conduct which the Court of Appeals admitted "skated on thin ice."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ."

STATEMENT OF THE CASE

Petitioner, John C. Wegner, was charged in a three-count indictment with having conspired with Charles W. Wegner, and Robert Strauss, to violate federal narcotics laws (Count I). The remaining substantive counts charged all defendants with possessing, with intent to distribute, a quantity of liquid amphetamine. A jury trial commenced on September 27, and ended on October 1, 1976 with a verdict of guilty as to each indictment on each of the three counts. Petitioner Wegner received a sentence of four (4) years on Count I, and a consecutive sentence of three (3) years on Count II (R. 45).

Statement of Facts

A. An Overview

The Government presented evidence which, taken in its proper perspective, tended to prove that John C. Wegner, along with others, conspired to manufacture illegal amphetamines in the northern district of Illinois. No specific issue is raised as to the sufficiency of the evidence. Rather, Petitioner's contention, in part, that Petitioner was denied a fair trial because of the emasculation of Petitioner's right to have the trial jury fully apprised and instructed in connection with a non-charged party, Kurt Johnson (hereinafter, Johnson).

B. Pleadings and Trial

Even prior to trial, it was the Petitioner's theory that Johnson was an uncharged Government informant, without whom this case would not have come about (Tr. 145, 146; R. 7, 8). As part of defendants' pre-trial motions, they requested of the Government information as to whether Johnson was an agent or employee, in any form, for any law enforcement agency from the years 1973 to 1976.

On June 1, 1976, the Government answered this pre-trial motion and advised Petitioner that there were no confidential informants involved in the investigation of the case. The Government added that whether or not Johnson was an informant in any other investigation by the Drug Enforcement Administration or was an informant with any other law enforcement agency during the years requested by Petitioner, was in the Government's opinion irrelevant to the issues of the case. Accordingly, the Government refused to furnish such information (R. 8).

Prior to trial, the Government was advised that under the defendant's theory of defense, Johnson was responsible for the indictment and would be necessary as a defense witness (R. 36; Tr. 145-146). The Petitioner subpoenaed Johnson as a trial witness at his last known address (Tr. 197-200). Counsel for Petitioner was advised that Johnson was out of the country (Tr. 198).

On the first day of trial, the Government informed the Court that they did not intend to call Johnson as a witness. Only at the Petitioner's insistence did the trial Court urge the Government to furnish all documents in their possession that related to any activities of Johnson in connection with the case on trial (Tr. 151).

On the second day of trial, Petitioner, being unable to locate Johnson, filed a written motion for production (R. 23). The Court thereupon inquired of the Government as to the whereabouts of Johnson. The Government responded that if the Government chose to call Johnson as a witness, the Government believed that a subpoena could be served on Johnson. The Government then informed the Court that they had the name of an individual who promised to produce Johnson if he was deemed necessary to be produced. The Court at that point expressed its opinion that

Petitioner was entitled at least to have access to the witness if the witness could indeed be located (Tr. 198-199).

On the third and last day of trial, after all but one defense witness was called, Johnson and his counsel appeared. The substance of what occurred is that absent the jury, Johnson testified and, in part, asserted a Fifth Amendment privilege (Tr. 509-521). Johnson does say that were he offered immunity he would testify (Tr. 517). Petitioner urged that Johnson be granted immunity in exchange for truthful testimony, however, the Government objected and no immunity was granted (Tr. 613-614). Ultimately, Johnson testified before the trial jury as to his name only (Tr. 517). The Court refused all theory of defense instructions, including Petitioner's proposed entrapment instruction (Tr. 498-499).

The trial facts revealed that Petitioner, Strauss, and Johnson were the active participants in setting up a clandestine chemical laboratory in January, 1975 (Tr. 450, 460-463). Originally, the laboratory was at a farm house in Yorkville, Illinois. While the laboratory was there, Johnson was the operator and the knowledgeable party (Tr. 450, 460-463).

The actual surveillance in this case commenced in February, 1975. On several occasions from February until June, 1975, Johnson is referred to in D.E.A. reports as John Doe #1. (Tr. 184-188; 248-269, 312-324). In June, 1975, after Petitioner is involved in the picking up of chemicals from a gas station, he is seen rendezvousing with this same John Doe.

One Government witness, Special Agent Labik, while testifying as a Government witness on re-direct examination, described what he believed to be Johnson's role as follows:

> A. At that time I wrote that report it was my belief and my understanding that Kurt Johnson had played

> a vital part in the production of this laboratory, and that at some time subsequent to the writing of this report, that he would be, I mean, that he would be subsequently arrested and indicted on this investigation. (Tr. 324).

Johnson, however, was never mentioned in the Government's indictment (R. 1).

Prejudicial error, that occurred during the Government's closing argument, is contained in Issue 2, infra, and will not be here repeated.

REASONS FOR GRANTING THE WRIT

1.

The decision of the Court of Appeals holding that the trial Court properly sustained a crucial witness' assertion of his Fifth Amendment privilege against self-incrimination substantially conflicted not only with Petitioner's Fifth Amendment due process rights, but moreover, conflicted with Petitioner's Sixth Amendment right permitting compulsory process for obtaining witnesses in his favor.

It was Petitioner's contention that he was denied a fair trial due to the emasculation of Petitioner's right to have the trial jury fully apprised and instructed in connection with a non-charged party whose actions on behalf of the Government were sufficient to buttress the initiation and inducement requirements of an entrapment defense. This non-charged party was Kurt Johnson. From the outset of trial, defense counsel made it clear that Johnson was critical to the Petitioner's case (Tr. 145). Despite diligent efforts, however, Petitioner was unable to subpoena Johnson due to Johnson's change of residence. The Government, at this same point, didn't as yet not intend to call Johnson. The Government, however, specifically reserved this right upon hearing Petitioner's defense (Tr. 145).

On the second day of trial, the Government admitted that they had the name of an individual who promised to produce Johnson if necessary. Ruling that the Petitioner was entitled to access to the witness, the trial judge required the Government to then produce Johnson (Tr. 198-199). Finally, on the third and last day of trial, after all but one defense witness had been called, Johnson and his counsel appeared. Only at this point did the Government admit that they interviewed Johnson before trial, and that Johnson then related to them his plans to exercise his Fifth

Amendment privilege. Yet, despite the knowledge gained from this pre-trial interview, the Government on the first day of trial was maintaining that their calling Johnson as a witness would depend on the defense Petitioner raised at trial (Tr. 145). Obviously, if Petitioner's testimony was damaging, and the defense case was strong, Johnson would have been granted immunity. Were it otherwise, the Government could hardly tell the Court that whether Johnson would testify or not would depend upon the defense case.

The Government's conduct makes a poker game out of what should be a trial in which both Petitioner and the Government have ample opportunity to investigate guilt or innocence of the accused. As this Court stated in *Warduis* v. *Oregon,* 412 U.S. 470 (1973):

> "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as due process is concerned, for (a rule) which is designed to enhance a search for truth in the criminal trial by ensuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." (412 U.S. at 474).

As the Government readily admits, they reserve the right to call Johnson as a witness. Thus, despite the fact that Johnson told the Government that he planned to exercise his Fifth Amendment privilege, the Government could have immunized Johnson if they felt his testimony was needed. Unfortunately, Petitioner at trial was not afforded this same luxury.[1] Despite the fact that Petitioner

[1] This presupposes that the fundamental rights allowing defendants to present a full and adequate defense and the right to have compulsory process for obtaining witnesses in their favor, are merely luxuries sometimes afforded fortunate defendants. The more proper reading, is that constitutional guarantees, are guarantees, not luxuries.

clearly indicated that Johnson was critical to his defense, both before and during trial, the testimony of Johnson was denied Petitioner. The trial Court not only sustained Johnson's Fifth Amendment privilege, but moreover, refused to instruct the Government to give Johnson immunity.

In *Hoffman* v. *United States,* 341 U.S. 479 (1951), this Court provided the standard by which a trial Court should evaluate the legitimacy of a witness' invocation of the Fifth Amendment. The Court stated:

> "The trial court in appraising the claim *must be governed as much by his personal perception of the peculiarities of the case* as by the facts actually in evidence." (341 U.S. at 487)

In *U.S.* v. *Anglada,* 524 F.2d 296 (2nd Cir. 1975), defendant was denied the testimony of an informer who allegedly entrapped him, because the informer asserted his Fifth Amendment privilege. The *Anglada* Court reversed the conviction on other grounds, and advised on remand:

> "That if the situation arises again, the trial judge (should) take a harder look at any blanket assertion of privilege and also at the possibility of allowing some carefully phrased questions by Anglada's counsel." (524 F.2d at 300)

The Court proffered this advice in light of "the unique nature of the informer's testimony in establishing the entrapment defense." (524 F.2d at 300)

An expansive review of sustaining the privilege *vel non* is found in *U.S.* v. *Moreno, et al.,* 536 F.2d 1042 (5th Cir. 1976). In *Moreno,* a decision based upon facts similar to those as exist in the instant case, a jury trial narcotics conviction was reversed. There, a subpoenaed defense witness had an "in camera conference" with the trial Court after the prosecution advised that the witness would as-

sert his Fifth Amendment privilege. (Id. at 1044) On appeal, the Court reversed, finding, *inter alia,* a Sixth Amendment violation in failing to compel the witness to appear before the trial jury. The *Moreno* Court stated:

> "In *Washington* v. *Texas,* 388 U.S. 14, 19, 87 S. Ct. 1920, 1923 (1967), the Supreme Court spelled out the significance of the Sixth Amendment right of the accused 'to have compulsory process for obtaining witnesses in his favor.' The Court noted: 'The right to offer testimony witnesses and compel their attendance, if necessary, is in plain terms the right to present a defense.' The Sixth Amendment's policy is reinforced by the broad requirement of fundamental fairness that the due process clause of the Fourteenth Amendment imposes. In *Chambers* v. *Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 1949 (1973), the Supreme Court stated, in the course of a discussion of due process: 'Few rights are more fundamental than that of an accused to present witnesses in his own defense.' " (536 F.2d at 1046).

In light of the critical nature of Johnson's testimony to Petitioner's defense, the proper course for the trial Court would have been to not permit Johnson to invoke his Fifth Amendment privilege. Johnson's testimony could have been given without fear of incrimination as suggested by the Court of Appeals. While two DEA agents did testify that Johnson was involved in the operation of a clandestine laboratory, the investigation had already been closed and Johnson was mysteriously never indicted nor charged. If there was a real fear of incrimination, then the trial Court could have compelled the Government to immunize Johnson. As the Government would have immunized Johnson if the Government felt his testimony was needed, it is only common sense fair play that the same procedure be afforded Petitioner. In the context of both Fifth Amendment due process, and Sixth Amendment right to compulsory process, Petitioner must receive a new, constitutionally fair trial. Certiorari should be allowed.

2.

Petitioner was deprived a fair trial due to the conduct of the Government during its closing argument, conduct which the Court of Appeals admitted "skated on thin ice."

The closing arguments by both Government attorneys were a study in impropriety. Petitioner, in his argument below, set forth numerous instances in which the prosecution argued improperly and prejudicially. Specifically, those instances fall under the following four categories: (a) Improper interjection of personal belief to vouch for arguments; (b) Improper reference to facts that were plainly not presented in evidence used to bolster arguments; (c) Improper comment on the taking of an oath of office; (d) Repeated and improper reference to the fact that a Grand Jury had indicted the defendants.

After reviewing the prosecutor's improper closing arguments, the Court of Appeals in its opinion stated:

> ". . . We believe the prosecutor skated on thin ice in several instances, . . ." (Order at page 7)

In response to the fourth general category of improper argument, that being the Government's improper repeated references to the fact that the Grand Jury had indicted the defendants, the Court of Appeals characterized such arguments as "the most serious of all." (Order at page 7)

The Government, in its responsive brief, while arguing that their comments during closing argument did not constitute reversible error, conceded that their remarks were "unfortunate" admitting that the same were, as contended by Petitioner, "expressions of personal opinion by the prosecutor." (Government's brief at 24, 27). The Government attempted to justify their improper remarks as falling within the rubric of invited response. *United States* v. *Ashilla,* 234 F.2d 797, 802 (7th Cir. 1956) (Government's brief at 28-33).

Despite the Government's concessions, the Court of Appeals, in its order, held that when the prosecutor's improper closing arguments were viewed in the context of the entire case, any indiscretions were harmless. *United States* v. *Isaacs,* 493 F.2d 1124, 1165 (7th Cir., Cert. denied 417 U.S. 976).

In the instant case, there were two instances in which the prosecutors improperly interjected personal belief, utilizing the magic words, "I think" or "I believe." (R. 663, 666). In the first such instance, Government counsel, after reviewing certain acts of the defendants, interjected his personal opinion as to their intent, stating:

> "They are not innocent participants. *I think* that it tells you a lot about their intent." (R. 663) (Emphasis added)

Next, Government counsel, in discussing defense witness Rhonda R. Johnson stated:

> "Rhonda Johnson admitted she used an amphetamine, and she said once was enough, she was nervous already. She was lucky, *I believe.*" (R. 666) (Emphasis added)

In both such instances, Government counsel attempted to buttress a fact not in evidence by his own personal opinion.

The Government has conceded that such comments as "I think" or "I believe" are improper. (Government's responsive brief at 27) Moreover, the Government admitted to the expression of such improper personal comment in this case. (Government's responsive brief, at 27) Nonetheless, the Government contends that despite the impropriety of such a comment, because the trial Court sustained Petitioner's objection thereto, the harm resulting therefrom was mitigated. Yet, as stated by the Seventh Circuit in *United States* v. *Grooms,* 454 F.2d 1308 (1972), such comments

> ". . . possess the seeds of reversible error in that they tend to amplify the possibilities that lay jurors may be misdirected from properly weighing the evidence by the implicit invitation to adopt the evidentiary assessment of the attorney."

In light of such language, beyond mere impropriety, these comments by the prosecutors were clearly prejudicial. Although the trial court did sustain Petitioner's objection to such commentary, the commentary was not ordered stricken. In any case, it is difficult to imagine how the mere sustaining of an objection sufficiently mitigated the prejudice resulting therefrom. As stated in the plain language of *Grooms, supra,* such commentary has "no place in the trial of cases." Id. at 1312. See also *United States* v. *Handman,* 447 F.2d 843, 856 (7th Cir. 1971); *Greenburg* v. *United States,* 280 F.2d 472, 474-475 (1st Cir. 1960).

In addition, Petitioner was denied a fair and impartial trial due to the prosecutor's rebuttal argument, thereby requiring reversal. Specifically, Petitioner, in his consolidated Brief, delineated six specific comments, constituting so thorough a pattern of impropriety and prejudice as to virtually deprive Petitioner of his theory of defense at trial (Appellant's brief at 37-41). At trial, it was Petitioner's defense that he was entrapped, and that mysteriously Kurt Johnson was never indicted. The Government, in its rebuttal argument, commented that the Grand Jury heard the evidence and chose not to indict Johnson. The prosecutor added, "Now, because Kurt Johnson is not on trial in this case, and you will receive instructions to this effect, doesn't mean that Kurt Johnson won't be indicted for this offense." (Tr. 684) This was clearly erroneous. Not only was there no evidence presented that Kurt Johnson was to be indicted, but in fact, the only evidence was that he was not indicted. Compounding this grossly improper and prejudicial statement was the trial Court's admonition that whether or not Kurt Johnson was indicted

was irrelevant. Thus, at one stroke the Court shattered the defense theory which has as its foundation the lack of charges against Kurt Johnson despite his participation in the acts alleged in the indictment.

Finally, adding insult to injury, the Court sanctioned the Government's statement that Kurt Johnson was irrelevant, "Despite Mr. Ackerman's (Defense Counsel) attempt." This amounted to a derogatory comment relative to Petitioner's attorney.

In response, the Government concedes that its rebuttal argument would have been improper were it not for the fact that the defense invited such a response, reasoning that where defense counsel insinuates that the United States has abused or misused its power, prosecutors have a clear right to reply (Government's brief at 29, 33).

Petitioner has no quarrel with the principle of invited response as a general proposition. However, the Government should not be permitted to utilize this principle as a shibboleth behind which to spew forth improper and prejudicial commentary with impunity. Quite simply, the excerpt cited by the Government from the defense' closing argument on which it seeks to justify the six challenge remarks reflect no more than the Defendant's theory of the case. (See Excerpt cited in footnote #35 of the Government's brief at page 28) Contrary to the contention of the Government, defense counsel in closing argument did not insinuate that the Government had abused or misused its power. Therefore, there was nothing to which the Government needed to reply in its rebuttal arguments. Rather, Defendants presented the plausible theory that Johnson, and not Petitioner, was responsible for the acts alleged in the indictment. Accordingly, Petitioner urges this Court pursuant to its supervisory power, to consider utilization of the invited response principle as a basis on which to

justify the prosecutor's improper and prejudicial rebuttal argument.

Finally, assuming for the sake of argument, that insinuations of abuse or misuse of power may be permissibly inferred from Petitioner's closing argument, the Government should still not be permitted to reply with a patently improper and prejudicial comment found in this case during its rebuttal argument. Most serious of all were the repeated instances in which the Government improperly utilized the fact that a Grand Jury had indicted Petitioner in furtherance of their burden to prove that Petitioner was, in fact, guilty (Appellant's Brief at 38-41).

It is difficult if not impossible to imagine how this pattern of improper argument could be deemed anything but grossly prejudicial. These comments by the Government virtually deprive Petitioner of his entire defense theory. Moreover, in response to the sharp objection in motions for mistrial by defense counsel, the trial Court simply chose to overrule and deny the same, thereby serving tacitly to condone the prosecutor's commentary. This pattern of grossly improper and prejudicial commentary was unwarranted, and must not be sanctioned in a Federal Court. *United States* v. *Phillips,* 527 F.2d 1021 (7th Cir. 1975), *United States* v. *Wasko,* 473 F.2d 1282, 1284 (7th Cir. 1973), *United States* v. *Herrara,* 531 F.2d 788 (5th Cir. 1976). Certiorari should therefore be allowed.

CONCLUSION

For any or all of the foregoing reasons, the Petition for a Writ of Certiorari should be allowed to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

EDWARD M. GENSON
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 8, 1977.
(Argued April 21, 1977)
Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 76-2124, 2125, 2126 vs.

JOHN C. WEGNER, CHARLES W. WEGNER, and ROBERT STRAUSS, JR.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 CR 491
Bernard M. Decker, Judge.

ORDER

Defendants appeal on several grounds from their narcotics convictions arising from their operation of a laboratory that illegally manufactured amphetamines. We affirm.

I.

The government's evidence at trial, the sufficiency of which the defendants do not challenge, consisted to a great extent of evidence seized at two locations pursuant to two search warrants based on an affidavit sworn to by a Drug Enforcement Administration agent. The defendants argue that the warrants were improper in that the affidavit contains false representations, and consequently the evidence seized pursuant to them should have been suppressed.

In particular, defendants maintain that the affiant (1) intentionally failed to mention that local police officers observed a laboratory at one of the locations while responding to a burglary complaint; (2) misrepresented that several companies through which the defendants purchased supplies do not exist; and (3) misrepresented that he smelled a pungent chemical odor near the premises.

United States v. *Carmichael,* 489 F.2d 983 (7th Cir. 1973) (en banc), holds that suppression is warranted in such a situation if it can be shown that the affiant (1) recklessly misrepresented a material fact or (2) intentionally misrepresented a fact, whether or not material. Applying this standard, the misrepresentations alleged here do not warrant suppression. The record contains no evidence that they were made intentionally, and, assuming *arguendo* that they were made recklessly, they are immaterial because the affidavit presents sufficient evidence of probable cause for the searches with reference to the challenged facts. See *United States* v. *Taxe,* 540 F.2d 961, 967 (9 Cir. 1976).

II.

Mention was made throughout the proceedings of a Kurt Johnson who allegedly participated with the defendants in the operation of the clandestine laboratory. Johnson was observed by federal agents during their investigation

of the laboratory, but was never arrested or indicted for his participation in the laboratory activities.

During discovery, in response to a defense inquiry, the Government informed defense counsel that Johnson had not provided them with information regarding the case. A few days before trial, after informing the Government that Johnson's appearance was essential to their case, the defense unsuccessfully attempted to subpoena Johnson. At about the same time, the Government interviewed Johnson and learned that he would invoke his Fifth Amendment privilege against self-incrimination if he were called as a trial witness.

On the second day of trial, the defense filed a written motion asking the court to order the Government to produce Johnson. During discussion of the motion, the Government gave defense counsel the name of Johnson's attorney, who had promised to produce Johnson if necessary. On the third day of trial, near the end of the defense case, Johnson appeared with his counsel. The court and both counsel conducted a *voir dire* examination of Johnson and his attorney. Johnson revealed that he had spoken to representatives of the government before trial and that he would invoke his Fifth Amendment privilege if called as a witness. He also said that he would testify if granted immunity from prosecution. Later, Johnson was called as a witness and testified only as to his name. The judge then instructed the jury that Johnson would not testify, that he was within his rights in refusing to do so, and that no inference should be drawn as to the defendants' guilt or innocence by reason of Johnson's refusal to testify.

Based on these events and the defendants' claim that Johnson's testimony was essential to their case, the defendants argue that the trial court committed prejudicial error

by not granting Johnson immunity from prosecution so he could testify in their behalf and by allowing him to invoke his Fifth Amendment privilege at trial. In addition, they argue that because of the Government's misconduct in connection with the events surrounding the production of Johnson, we should use our supervisory powers to overturn the conviction.

As to granting Johnson immunity, the law in this Circuit is clear that the defense has no right to have immunity conferred upon a defense witness who exercises his privilege against self-incrimination. *United States* v. *Smith,* 542 F.2d 711, 715 (7th Cir. 1976); *United States* v. *Allstate Mortgage Corporation,* 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied,* 421 U.S. 999 (1975); *United States* v. *Ramsey,* 503 F.2d 524, 532-33 (7th Cir. 1974), *cert. denied,* 420 U.S. 932 (1975). This contention is thus meritless.

As to the court's permitting Johnson to invoke his privilege, the defense argues that the transcript reveals that Johnson faced no real fear of incrimination and thus the court should not have permitted him to invoke his privilege in view of the defense's professed desire for his testimony. *Hoffman* v. *United States,* 341 U.S. 479, 487 (1951); *United States* v. *Moreno,* 536 F.2d 1042 (5th Cir. 1976); *United States* v. *Anglada,* 524 F.2d 296 (2d Cir. 1975). This argument fails on the basis of its faulty premise—Johnson faced a real fear of incrimination, as evidenced by the prior testimony at trial of two DEA agents that Johnson was involved in the operation of the clandestine laboratory. The judge was aware of this testimony when Johnson invoked his privilege and thus acted properly in allowing him to invoke it.

As to the claim that government misconduct should call into play our supervisory powers, the defense has presented us no more than vague allegations that the government was "playing a poker game" that violated due process. The only concrete allegations presented with respect to the Johnson matter are the two discussed above. The only other allegation we can discern in the defense's argument is that the Government had a duty to produce Johnson before trial, or at least a duty to inform the defense before trial that Johnson intended to invoke his privilege against self-incrimination at trial. However, neither Federal Rule of Civil Procedure 16 nor 18 U.S.C. § 3500 requires such disclosure, nor have we been directed to any case requiring such disclosure. We thus find no merit in this argument.

III.

Next, defendants challenge the judge's charge to the jury. They argue that an instruction relating to confessions should have been given in view of statements Strauss and John Wegner made to police after their arrest and that the judge inadequately instructed the jury on the defense's theory of the case.

Confession Instruction

The DEA agent who arrested John Wegner testified that, after he arrested him and advised him of his rights, Wegner told him that "he had been caught, that he had been producing Benzedrine." The agent who arrested Strauss testified that Strauss told him, after he had been advised of his rights, that he, Strauss, knew of two clandestine laboratories in the Chicago area. Defense counsel did not object to the admission of either statement.

No instruction relating specifically to the above statements was given to the jury. However, following the reading of the instructions to the jury, defense counsel objected to the court's failure to give its tendered instruction which advised the jury that it must consider a confession with great care and must determine beyond a reasonable

doubt that a confession is voluntary before considering it at all. The court overruled the objection on the grounds that it never received the defense's instruction and that there was nothing in the record, except the fact that the defendants were in custody, from which the jury could conclude that the statements were involuntary.

Defendants argue that the judge was required under 18 U.S.C. § 3501(a)* to give the tendered instruction. In *United States* v. *Adams,* 484 F.2d 357, 362 (1973), we considered Section 3501(a) and held that it was not error for a judge, after finding a confession to have been voluntarily made, to omit a voluntariness instruction and merely instruct the jury that they must determine the confession's weight and credibility.

In the instant case, the judge found that the confession was given voluntarily and instructed the jurors generally on their obligation to independently determine the credibility of the sources of evidence and the comparative weight to be given particular items of evidence. The instructions were in effect the same ones we sanctioned in *Adams* and were not erroneous. See *United States* v. *Williams,* 484 F.2d 176, 178 (8th Cir.), *cert. denied,* 414 U.S. 1070 (1973).

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* 18 U.S.C. § 3501(a) provides in full:

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

Theory of the Case Instruction

The defendants next argue that the court's instruction as a whole did not adequately present their theory of the case: that Kurt Johnson was a government informant who induced the defendants to engage in the illegal manufacture of amphetamines.

In view of the court having expressly instructed the jury on this theory, albeit not to the defendants' satisfaction, we find the defendants' argument to be without merit.

IV.

Finally, the defendants argue that the prosecutors' closing arguments were so improper as to constitute reversible error. After reviewing the arguments, we believe that the prosecutors skated on thin ice in several instances, having personally vouched for arguments, referred to facts that were not clearly presented as evidence, mentioned the taking of an oath of office, and, most serious of all, referred repeatedly to the fact that a grand jury had indicted the defendants.

However, these statements were not entirely unprovoked, given the vituperative allegations of Government impropriety in the defense's argument. For instance, defense counsel made the following statements:

> "[By bringing back a guilty verdict] you are going to let the government set up something, equip something and let the prime mover walk away . . . .
>
> What does it all boil down to? Something very simple: That the government played a game and here was the game; the game was a chemical laboratory and Mr. Johnson was their infiltrator, or was he their set up man or was he their moving party . . . ."

Where defense counsel insinuates that the Government has abused or misused its power, prosecutors have a right to reply to clear up the record. See *United States* v. *Isaacs*, 493 F.2d 1124, 1165 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

Moreover, in several of the cited instances, the court instructed the jury to disregard the prosecutor's remark. We have recognized that such instructions can often alleviate any prejudicial effect stemming from such comments. See *United States* v. *Greene*, 497 F.2d 1068, 1084-85 (7th Cir. 1974.)

Finally, viewing the argument as a whole in the context of the entire case, any indiscretions by the prosecutors are insignificant in view of the overwhelming evidence of the defendants' guilt. See *United States* v. *Jackson*, 542 F.2d 403, 409-11 (7th Cir. 1976).

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 3, 1977.
Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 76-2126 vs.

JOHN C. WEGNER,
Defendant-Appellant.

On Petition for Rehearing

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Defendant-Appellant John C. Wegner, all of the judges on the original panel having voted to deny the same,

It Is Hereby Ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.